Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications	)	
Act of 1996: Accounting Safeguards Under	)	CC Docket No. 96-150
the Telecommunications Act of 1996	)	

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), submits these comments regarding Verizon's Petition for Reconsideration and Request For Stay of the Commission's January 10, 2002 Order denying Verizon's request for confidential treatment of information contained in Verizon's biennial audit report filed under § 272(d) of the Act. SBC is not a party to this proceeding and nothing in this Order affects SBC. However, SBC is concerned that this Order sets a precedent that might be applied to SBC in the future, and therefore, feels compelled to file comments here.

I. Introduction and Summary

From what SBC can discern, on January 10, 2002, the Commission entered a sweeping order, denying Verizon's request for confidentiality and providing no protection whatsoever for competitive information provided under § 272.[1] This Order was a sudden and abrupt departure from the Commission's long-standing policy of protecting confidential information provided to it in the course of audits. The entire course of treatment of confidential information in this case employs unfair procedures and unwise public policy because companies like Verizon agreed to permit proprietary information to be included in the audit report in reliance on this Commission's policy of protection of such information. The Commission purported to depart from its long-

[1] *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996*: § 272(d) Biennial Audit Procedures, CC Docket No. 96-150, Rel. January 10, 2002 (*Verizon Disclosure Order*).

standing policy because of its interpretation of the statutory requirements that the results of the biennial audit are subject to public inspection. SBC believes that the statute cannot fairly be interpreted in this manner and that confidential information should be withheld from public inspection. In the alternative, however, the Commission can avoid unnecessary harm to Verizon by releasing its confidential information by providing interested parties limited information subject to appropriate protective agreements.

II. The Commission's Change in Policy is Inconsistent with Precedent and is Based on a Misinterpretation of the Law

The Commission has had a long-standing policy of protecting confidential information under § 220(f) of the Act and § 0.459 of the Commission's rules.[2] The Act prohibits the Commission from divulging general information that it obtains from a company's books and records during the course of an audit except in limited instances. Further, the Commission's own rules provide even stronger safeguards against releasing confidential or proprietary information, and in § 0.459, establish specific procedures for handling requests for confidential material or information submitted to the Commission.[3]

Exemption 4 of the FOIA requires a federal agency to withhold from public disclosure confidential commercial and financial information of a person unless there is an overriding public interest requiring disclosure. *National Parks v. Morton* established a two part test for

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[2] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, (*Confidential Treatment Policy R&O)* GC Docket No. 96-55, FCC 98-184, para. 54 (August 4, 1998).

[3] SBC is concerned that the Commission did not follow its normal procedures for confidentiality in this case. It appears to have based its confidentiality determination not on the usual FOIA request, but on informal letters filed by parties. Further, the Commission's January 23, 2002 Order directs the auditor to file the unredacted version of the 272 audit report within 10 days "absent any further action." This appears inconsistent with § 0.459 of the Commission's rules, which states that information will be accorded confidential treatment until the Commission "acts" on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.

determining if information qualifies for withholding under Exemption 4.[4] The first prong asks whether disclosing the information would impair the government's ability to obtain necessary information in the future. The second prong asks whether the competitive position of the person from whom the information was obtained would be impaired or substantially harmed. If the information meets the requirements of either prong then it is exempted from disclosure under Exemption 4.

Under the first prong, the FCC has routinely presumed that impairment would occur if commercial and financial information used to prepare an audit is publicly released.[5] The instant information discovered during the audit process and voluntarily disclosed to the agency is precisely the same type of information that has not been disclosed in the past out of concern that cooperation with agency requests for information would be undermined by disclosure. The first prong of the *National Parks* test is clearly met under these circumstances.

Despite the fact that similar information has been protected in the past, the Commission now states that proprietary information contained in the audit results of a § 272(d) audit is not protected by the confidentiality provisions of 47 U.S.C. §220.[6] The Commission believes that because § 272(d)(2) specifically permits any party to file comments on the audit report, this statute overrides the general protection of confidential information afforded by § 220.[7] The Commission, however, has misinterpreted the requirements of § 272(d).

Section 272(d) requires that a company subject to § 272's separation requirement engage an independent auditor to perform an audit "to determine *whether* such company has complied

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[4] *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 D.C. Cir. (1974) ("*National Parks*").

[5] For instance, in *Scott J. Rafferty*, 5 FCC Rcd 4138 ¶ 5 (1990), the Commission concluded that proprietary information used by Commission staff to create an audit report was not subject to disclosure.

[6] *Verizon Disclosure Order* at 5.

[7] *Id.*

with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b)."[8] The "results" of the audit are to be committed to a "final audit report" and filed with the Commission to be made available for public inspection and comment.[9] Access to workpapers and underlying documents, such as financial account information and other records, however, is strictly limited to the independent auditor, the Commission and state commissions.[10] State commissions are required to implement procedures to protect the confidentiality of any proprietary information.[11] By statute and by its own regulations, the Commission is already under the obligation to maintain the confidentiality of proprietary information, including specifically audit information submitted to the Commission.[12]

Read together, it is clear that Congress intended public inspection and comment to be permitted only on the "results" of a § 272(d) audit, not on underlying confidential information. The term "results" of an audit has a well-known meaning under auditing standards. It does not include underlying source data obtained during the audit which is generally retained in the auditor's workpapers. The fact that access to workpapers and confidential information is strictly limited under the statute indicates very clearly that Congress never intended that § 272(d) would change past Commission practice by requiring that confidential information be included in a final audit report and open for public inspection. The Commission's conclusion in the Verizon Disclosure Order that § 272(d)(3) never expressly prohibits disclosure of confidential information ignores the clear intention in the statute. The fact that § 272(d)(3) strictly limits

[8] 47 U.S.C. § 272(d)(1).

[9] *Id*., § 272(d)(2).

[10] *Id*., § 272(d)(3)(A)-(B).

[11] *Id*. § 272(d)(3)(C).

[12] 47 U.S.C. § 552(b)(4); 47 C.F.R. O.457(d)(1)(iii).

access to confidential information clearly indicates that this information was never intended to be included in the "results" of the audit that § 272(d)(2) requires be made available for public inspection and comment.

The Commission has already provided automatic protection to all proprietary information in the audit workpapers. The Commission stated in its Accounting Safeguards Order that "workpapers related to the biennial audits, including material obtained from the examined entities, will receive confidential treatment consistent with § 220(f) and the Commission's policy for Part 64 audits." It further held that while the Commission and state public utility commissions have access to the workpapers and proprietary documents under § 272(d)(3), it "will not extend this access to other parties" because that "is clearly beyond the scope of § 272(d)."[13] SBC believes that just as providing access to workpapers is beyond the scope of § 272(d), providing access to proprietary information contained in the workpapers is also clearly outside the scope of § 272(d). It would be illogical to conclude that the FCC can avoid application of the statutory protection of workpapers by the simple effort of requiring all the information in the workpapers to be incorporated into the final audit report. Such a result stands the statutory protection provision on its head.

If the Commission rejects this analysis, it should still follow past precedent by protecting confidential information discovered during the audit process. Once information is found to qualify for Exemption 4, the FCC cannot disclose the confidential commercial or financial information unless there is "a compelling public interest in disclosure outweigh[ing] any interests in confidentiality."[14] The FCC has previously exercised this balancing test in determining what information from an audit report should be disclosed to the public:

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[13] *Accounting Safeguards Order*, CC Docket 96-150; FCC 96-490, ¶ 204.

[14] *Classical Radio for Connecticut, Inc.,* 69 FCC Rcd 1517 (1978); *Western Union Telegraph Co.*, 2 FCC Rcd 4485 (1987).

> Our general policy is to withhold from public disclosure audit reports . . . We have departed from this general policy and released audit reports . . . only in exceptional cases when we have determined: (1) that the summary nature of the data and information contained in a particular report is not likely to cause the providing carrier substantial competitive injury; (2) that release of summary data and information is not likely to impair our ability to obtain such information in future audits; and (3) that overriding public interest concerns favor release of the report."[15]

Here, the information being redacted is not summary, but rather is extremely specific. The instant case is clearly not an exceptional case that requires disclosure.

The portions of the audit report that Verizon has agreed can be made public should provide sufficient information so that third parties may meaningfully evaluate Verizon's compliance with § 272. Unlike cases warranting disclosure in the public interest, the instant audit data is not "a necessary link in a chain of evidence"[16] needed to resolve an issue before the FCC. Rather, the nonproprietary information in the audit report clearly permit the public "to understand the extent of the auditor's testing and evaluation procedures."[17] While the FCC itself and state commissions may require access to specific information contained in the auditor's workpapers and company documents, the limited role of third party participation does not require anything more than the redacted version of the audit report to be made public. Thus, the public interest in disclosure does not outweigh the need to keep specific commercial and financial information confidential. The FCC should continue to adhere to its "policy of not authorizing the disclosure of confidential financial information 'on the mere chance that it might be helpful.'"[18]

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[15] *Bell South Corporation*, 74 Rad. Reg. 2d (P & F) 411, ¶ 8 (1993) (footnotes omitted). *See also Scott J. Rafferty*, 5 FCC Rcd 4138, ¶ 8 (1990).

[16] *Classical Radio for Connecticut, Inc.,* 69 FCC Rcd 1517 (1978).

[17] *In re Application of Ameritech Corp., Transferor, and SBC Communications., Transferee, For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order at 179, ¶ 410 CC Docket No. 98-141 (Rel. October 8, 1999).

[18] *Confidential Treatment Policy R&O,* ¶ 8.

SBC believes that Verizon's publicly available audit report, with the limited redacted proprietary information, currently provides sufficient information for all interested parties to file meaningful comments. The redacted information in no way changes the results of the audit report. However, if the Commission believes that the information is insufficient for a party to file meaningful comments, it can grant limited disclosure through appropriate protective agreements. This is consistent with the Commission's past policy for the Commission has often balanced the information needs of an interested party with the needs of a company to keep its competitive information proprietary and grant disclosure subject to protective orders.[19] This approach also harmonizes the requirements of § 272(d)(2) with the requirements of § 272(d)(3), the confidentiality protections provided under § 220(f) with the need for meaningful public comment under § 272(d), and is consistent with the Commission's long standing practice.[20] Departure from the existing practice is inconsistent with the plain meaning and intent of § 272(d).[21]

III. The Commission's Departure from its Practice of Protecting Proprietary Information is Unfair and Unreasonable.

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[19] *See, e.g.*, *RBOC Continuing Property Record Audit*, 15 FCC Rcd 1784 (1999).

[20] "The cardinal principle of statutory construction is to save and not to destroy." *Labor Board v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 30. It is our duty to "give effect, if possible, to every clause and word of the statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152, rather than to emasculate an entire section, as the Government interpretation requires. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

[21] Comptel argues that the information should be made public because Comptel needs the information for other dockets as well. Comptel misunderstands the intent of the biennial audit. The purpose of the audit is not to provide information for other dockets but simply to determine the audited parties' compliance with the provisions of § 272. If Comptel desires to obtain proprietary information in another proceeding it can petition the Commission for disclosure of information in that particular proceeding.

As stated above, the statutory scheme never contemplated that proprietary information be part of the auditor's report.[22] The FCC's order implementing the § 272(d) audit requirement was consistent with the statute. Thus, in ¶ 201 of the Accounting Safeguards Order, the Commission stated that "in our rules governing the biennial audits required by § 272(d), we will require that the independent auditor's section of the audit report include a discussion of…the auditor's findings and conclusions on ***whether*** the examination of the books, records and operations has revealed compliance or non-compliance with § 272 and with the affiliate transactions rules and any applicable nondiscrimination requirements." (emphasis added) Therefore, it is clear that the FCC intended that the results included in the audit report only address "whether the examination…revealed compliance or non-compliance" and not include the specific and detailed information contained in the supporting evidentiary matter obtained by the auditor. This type of detailed information would have been appropriately included in the auditor's workpapers consistent with the common and accepted practices of the auditing profession.

Subsequently, however, the Common Carrier Bureau and the Joint Federal/State Oversight Team (JOT) adopted an agreed-upon procedures (AUP) audit, essentially changing the nature of the audit. Under an AUP audit, the auditors were not required to reach conclusions on compliance. The auditors were only required to make detailed factual findings while the FCC and state commissions were to determine whether the company was in compliance. Therefore, the parties to the audit (i.e., the JOT and Verizon) negotiated audit procedures that necessarily called for a more complete explanation of the audit results in order to afford the JOT an opportunity to reach their own conclusions regarding compliance or non-compliance. In SBC's case, one of the basic underlying assumptions in this negotiation process leading to the adoption of the agreed-upon procedures was that SBC would have the opportunity to redact any proprietary information from the public version of the audit report. SBC at least relied on AICPA standards that specify that the auditor's report will be restricted to "specified users."

[22] § 272(d).

These AICPA auditing standards were designed to safeguard against an unspecified user not involved in the audit planning from taking the results or underlying data out of context for which it was intended. [23] It is for this reason that the auditors have included the statement on the restriction of use in the report. The specified users in both Verizon's and SBC's report include the Companies and the JOT only, not interested parties

Neither the companies nor the JOT contemplated that the public would have access to this detailed information. In fact, when the parties negotiated the audit procedures, they specifically contemplated that proprietary information would be included -- and protected -- in the audit report. Thus, for instance, paragraph 30(f) of SBC's AUP specifically states that the company may request confidential treatment of information contained in the audit report. It further provides specifically for the filing of two reports with the Commission: a public version with redactions, and a non-public version without redactions. Verzion appears to have negotiated similar procedures because its filing is consistent with SBC's procedures.

Thus, both the companies and the Commission staff have been operating with the understanding that proprietary information included in the audit report will be redacted and thus protected from public disclosure. Similar to Verizon's experience, SBC has often relied on staff's representations and provided additional proprietary information for the audit report.[24] Because the companies have consistently relied on such representations and on the FCC's long standing policy of protecting proprietary information, it is neither fair nor reasonable for the FCC to change its policies at this late stage of the audit proceedings.

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[23] AICPA Statement on Standards for Attestation Engagements: 10 ("SSAE 10"), Sections 2.04 & 1.79.

[24] During its audit SBC was asked by the FCC staff to permit inclusion of financial and other information in the report. SBC was told that not all FCC staff could review the workpapers and that the report would be imminently more useful to the FCC if SBC permitted the inclusion of proprietary information in the report. When SBC objected, SBC was told its fears about disclosing proprietary information were unreasonable because it could always redact proprietary information from the report. In hindsight, SBC's concerns were justifiable.

IV. CONCLUSION

The Commission's sudden departure from established policy regarding protection of proprietary information is unwise and unfair. The Commission should follow its established policy and protect proprietary information provided during the § 272(d) biennial audit. In the alternative, the Commission should, at a minimum, provide the information to interested parties subject to an appropriate proprietary agreement.

Respectfully submitted,

SBC Communications Inc.

By: /s/ Anu Seam
Anu Seam
Gary A. Phillips
Paul K. Mancini

1401 I Street NW 11th Floor
Washington, D.C. 20005

202-326-8891-Phone
202-408-8763-Facsimile

Its Attorneys

January 25, 2002